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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

In Re: Grand Jury

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

REDACTED

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals has sanctioned an extreme departure from the accepted and usual course of judicial proceedings by denying a writ of mandamus directing the Honorable Legrome D. Davis to recuse himself from supervising a grand jury investigation [redacted] where the undisputed record reflects a 15-year history of mutual political and personal conflict between Judge Davis and Senator Fumo culminating in Senator Fumo repeatedly and successfully blocking Judge Davis' appointments to the state and federal benches, thereby raising a substantial question as to the appearance of bias by Judge Davis against Petitioner.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Pennsylvania State Senator Vincent J. Fumo. In the district court, Petitioner moved for the recusal of the Honorable Legrome D. Davis as the Supervising Judge of Grand Jury Investigation No. 03-123.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Vincent J. Fumo, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported Order of the United States Court of Appeals for the Third Circuit, dated July 27, 2006, denying Petitioner's Petition for a Writ of Mandamus Directing Recusal of District Judge Legrome D. Davis as Supervising Judge of Grand Jury and Request for Expedited Hearing is reproduced at App. 1.

The unreported Order and Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania, dated July 13, 2006, denying Petitioner's Petition for Recusal of Supervising Judge Under 28 U.S.C. § 144 and 28 U.S.C. § 455(a) and (b)(1) is reproduced at App. 2.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the July 27, 2006 Order of the United States Court of Appeals for the Third Circuit.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455(a) provides:

> (a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

STATEMENT OF THE CASE

A *sine qua non* of the American system of justice is the impartiality, and indeed, the appearance of impartiality, of its presiding jurists. This Court has never addressed the issue of a supervising judge's duty to recuse himself under Section 455 in the face of evidence of the appearance of impropriety. While the Court has emphatically underscored the importance of maintaining the appearance of impartiality in the context of civil proceedings, this fundamental policy concern becomes of far greater concern in the instant case, where a supervising judge acts principally in secret and outside of public scrutiny, frequently reviewing prosecutorial evidence opposing a grand jury [redacted] to grand jury action *ex parte*. The intrusion of partiality and its appearance into a contested judicial matter represents an intolerable departure from the accepted and usual course of judicial proceedings. It is

this Court's supervisory responsibility over the inferior courts that requires its intercession in this matter to correct the continuing injustice resulting from the Third Circuit's failure to grant Senator Fumo's Writ of Mandamus and to compel Honorable Legrome D. Davis to recuse himself and correct the appearance of impropriety arising from Judge Davis' continuing supervision of Grand Jury investigation No. 03-123.

The Proceedings in the District Court Below

Judge Davis is the supervising judge of Grand Jury 03-123. On May 5, 2006, Pennsylvania State Senator Vincent J. Fumo filed a Petition for a Rule to Show Cause Why The Government Should Not be Held in Contempt for Violations of Fed.R.Crim.P. 6(e)(2), in connection with the government's alleged prejudicial disclosures to the media of secret grand jury materials. On June 5, 2006, Senator Fumo filed a Supplemental Petition for Contempt alleging additional deliberate grand jury secrecy violations arising from the public release of a 65-page affidavit incident to the arrest of two low-level Pennsylvania Senate employees (collectively referred to hereafter as the "6(e) petitions"). The 6(e) petitions were the first appearances by Senator Fumo before Judge Davis as supervising judge of the grand jury. In the interim, on May 31, 2006, [redacted]

On June 19, 2006, just two weeks after filing his supplemental petition, *while his Rule 6(e) petitions were pending* [redacted] Senator Fumo filed with the district court a Petition for Recusal of the Supervising Judge pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a) and (b)(1). Senator

Fumo's Petition detailed a bitter and highly public 15-year-long conflict between Senator Fumo and Judge Davis, during which the Senator and the Judge repeatedly challenged the ethics and competence of the other in the mass media. More importantly, over the course of those 15 years, Senator Fumo, through his party and government offices, repeatedly blocked Judge Davis' efforts to seek judicial appointments, first to the Philadelphia Court of Common Pleas and later to the District Court for the Eastern District of Pennsylvania. Indeed, as a direct result of Senator Fumo's widely reported efforts, Judge Davis' nomination to the Court of Common Pleas was twice denied by the Pennsylvania Senate and his nomination to the federal court was left to languish in the United States Senate for almost four years, from 1998 until his eventual confirmation in 2002 – a year before Judge Davis became Supervising Judge of Grand Jury 03-123. The factual record raises a serious and compelling basis to question the appearance, if not the reality, of the district court's ability to rule impartially, mandating Judge Davis' recusal under 28 U.S.C. § 455(a).

By Order and Memorandum Opinion dated July 13, 2006, Judge Davis denied Senator Fumo's Petition for Recusal. App. 2. On the same day, by separate Order and Memorandum Opinion, Judge Davis denied without hearing Senator Fumo's 6(e) petitions.

Senator Fumo sought review of Judge Davis' refusal to recuse himself by Petition for Mandamus filed with the Third Circuit Court of Appeals which the Third Circuit summarily denied.

Record of Partiality And The Appearance of Partiality

At the outset, it must be noted that, in resolving a Section 455 recusal motion – in contrast to a Section 144 motion – the court is not required to accept the movant's allegations as true.[1] Despite this review standard, [redacted] The following narrative juxtaposes the record put forward by Senator Fumo with Judge Davis' interpolations because Judge Davis' frequent departures from the record to inject extrinsic evidence – "evidence" which is clearly belied by the public record – reinforces the appearance of impropriety which patently arises from the record of antagonism between the two men.

The longstanding conflict between Judge Davis and Senator Fumo originated in 1986, with Judge Davis seeking, and not receiving, the support of Senator Fumo for a judicial vacancy in the Philadelphia Court of Common Pleas. Affidavit of Fumo ¶ 2. App. 25. Despite the opposition of Senator Fumo and other local political

[1] *See, e.g., In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997) ("Section 455 does not require the judge to accept allegations by the moving party as true").

leaders, Judge Davis was nominated by then-Governor Robert P. Casey in February 1987 to fill one of ten vacancies in the local court.

[redacted] In fact, Senator Fumo did much more than *not support* Judge Davis; he "actively opposed the confirmation of Judge Davis and . . . enlisted other Senators and political leaders from both parties in this effort." Affidavit ¶ 4. App. 26.[2] Although omitted from Judge Davis' Opinion, Senator Fumo's Affidavit states that Judge Davis' nomination was defeated, in large measure, by Petitioner's efforts: "[t]hough I was not personally present for the vote [rejecting Judge Davis' nomination], my colleagues were well aware of my strong opposition to Judge Davis' nomination." Affidavit ¶ 5. App. 26. Judge Davis' benign recollection of his nomination's rejection belies the fierce political infighting evidenced by his public comments to the press. Referencing an April 9, 1987 *Philadelphia Inquirer* article, [redacted] In fact, Judge Davis' newspaper quote

[2] As the ranking Democrat on the Pennsylvania Senate Appropriations Committee and member of the Judiciary Committee, Senator Fumo was a pivotal figure in denying Senate confirmation of unendorsed candidates, such as Judge Davis.

betrayed his true resentment toward "politicians," including, by his own admission, Senator Fumo:

> I didn't understand the politics of selecting judges. You would like to believe the judges are selected on merit, to make certain that good people get on the bench. I discovered that is almost accidental. More important, is that politicians be respected and followed.

Philadelphia Inquirer article of April 9, 1987, appended to district court Petition for Recusal as Exhibit "G."[3]

Judge Davis' Opinion also omits record evidence of his strident criticism of Senator Fumo during the nomination process:

> In a number of reported statements by Judge Davis, he accused party leaders, which included myself [Senator Fumo], of endorsing other candidates because we were more interested in money and control than we were in selecting candidates based on merit. Judge Davis went so far as to state that the criminal violations of those judges implicated in the "roofers scandal" of the 1980s were a direct result of the "back room" manner in which judicial candidates were endorsed, thus

[3] On or about March 8, 1987, Judge Davis – then an Assistant District Attorney – was required by local ordinance to resign his position, which he had held for six years at that time. In press reports, Judge Davis openly "agreed" with another unendorsed candidate, who stated that he "never foresaw either the personal sacrifice – that I would have to resign and be unemployed – nor the incredible difficulty of being unendorsed . . . I didn't understand the backroom politics." *Philadelphia Inquirer* article of March 8, 1987 appended to district court Petition for Recusal as Exhibit "D." [redacted]

> implying that I and other local party officials were responsible for criminal conduct.

Affidavit ¶ 8. App. 27.

[redacted] Indeed, Senator Fumo publicly warned that Judge Davis (and the others being supported by Governor Casey) could not be impartial and "would be beholden to the 'elitist' large law firms" if they are seated as judges. Affidavit ¶ 8. App. 27.

On May 19, 1987, [redacted] In an obvious reference to Senator Fumo and other politicians, Judge Davis was quoted in the press at that time as saying:

> that party leaders were more concerned about the result than they were admitting. By staging

> a news conference last week to announce formation of a 'Committee to Protect the People's Choice,' leaders of both parties signaled their fears of a real contest for the judgeships, Davis contended. "That was an indication that at the very end they realized it was going to be a very serious threat to their traditional power."

Philadelphia Inquirer article of May 22, 1987, appended to district court Petition for Recusal as Exhibit "K."

On June 24, 1987, despite Judge Davis' primary victory, the Pennsylvania Senate again voted not to confirm Judge Davis. The floor fight was again led by Senator Fumo. [redacted] which are reflected in Senator Fumo's contemporaneous comments in the public record:

> Mr. President, during the rigors of a campaign is when many people's character comes through . . . During the campaign . . . Mr. Davis [and another candidate] . . . demonstrated they did not have the type of judicial temperament and character that I think a judge has to have if he is going to be fair and reasonable and honest and have integrity. Yes, we need judges in Philadelphia, but we need excellent judges. We need the very best judges we can find in the city. These two gentlemen [including Judge Davis] do not fit into that character, in my opinion.

Legislative Journal of the Pennsylvania Senate, June 24, 1987 at 871-873.

On November 3, 1987, Judge Davis was elected to the Philadelphia Court of Common Pleas [redacted] Only after the general election did the Pennsylvania Senate finally confirm Judge Davis' nomination. Even then, Senator Fumo, in casting the lone vote in opposition, was quoted as stating that Judge Davis was not "the 'kind of character' he wanted on the bench." Affidavit ¶ 12. App. 29.

On July 30, 1998, President Clinton nominated Judge Davis to fill a vacancy in the District Court for the Eastern District of Pennsylvania. The nomination expired on October 21, 1998, without consideration by the United States Senate. [redacted] the averment in Senator Fumo's Affidavit that "I used my political connections to successfully block Judge Davis' confirmation to the federal bench." Affidavit ¶ 13. App. 29. [redacted]

On January 26, 1999, President Clinton renominated Judge Davis to a vacancy in the Eastern District. [redacted] Indeed, as discussed below, Judge Davis' awareness at that

time of Senator Fumo's pivotal role in blocking the Judge's nomination cannot be disputed.

On January 23, 2002, Judge Davis was nominated for a third and likely final time to fill a vacancy in the Eastern District. Having been twice denied confirmation, [redacted] Senator Fumo's Affidavit states that Judge Davis told Senator Fumo that Judge Davis knew that the Senator had spoken with United States Senators and White House staff in opposition to his nomination and that Judge Davis also acknowledged that he knew that top aides in the White House had expressly asked the Senator to abandon his opposition to the judge's confirmation. Affidavit ¶ 17. App. 30. [redacted]

Thereafter, [redacted] No such bargain was struck with Judge Davis. The bargain was struck with others. [redacted]

[redacted] Less than two years after Judge Davis' appointment to the federal bench, he became the supervising Judge of Grand Jury No. 03-123.

REASONS FOR GRANTING PETITION

A. The Third Circuit's Refusal To Direct The Recusal Of Judge Davis As The Supervising Judge Of Grand Jury Investigation No. 03-123, Despite Undisputed Evidence Of The Appearance Of The Judge's Bitter and Longstanding Animus Against Senator Fumo, Represents An Intolerable Departure From The Accepted And Usual Course Of Judicial Proceedings In The Federal Courts Of The United States.

The undisputed record of the bitter, and very public long-standing political and personal animus between Judge Davis and Senator Fumo, [redacted] requires Judge Davis' recusal under 28 U.S.C. § 455(a).

Section 455(a) of the Judicial Code provides that a judge of the United States "*shall disqualify himself* in any proceeding in which his impartiality *might reasonably be questioned*." 28 U.S.C. § 455(a) (emphasis added). "The test for recusal under 28 U.S.C. § 455(a) is whether a reasonable person, with knowledge of all the facts, would conclude that a judge's impartiality might reasonably be questioned." *In re Kensington Int'l, Ltd.*, 368 F.3d 289 (3d

Cir. 2004). The applicable standard requires that "the appearance of impropriety under 28 U.S.C. § 455(a) must be viewed from the perspective of the *objective, reasonable layperson, who is not necessarily familiar with . . . litigation.*" *Id.* at 303 (emphasis added). Finally, under Section 455(a), any reasonable doubts about the partiality of the judge ordinarily are to be resolved in favor of recusal. *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) ("doubts ordinarily ought to be resolved in favor of recusal").

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the seminal case on the application of Section 455(a), this Court affirmed the broad reach of a judge's duty to recuse himself in order to further the underlying public policy of maintaining the public's confidence in the impartiality of the judiciary, reasoning that: "We must continuously bear in mind that 'to perform its high function in the best way justice must satisfy the appearance of justice.'" *Liljeberg*, 486 U.S. at 863 (*quoting In re Murchison*, 349 U.S. 133, 136 (1955)) (citation omitted). In *Liljeberg*, the recusal issue arose from the non-jury trial of a dispute over ownership of a state-issued "certificate of need" authorizing the construction of a proposed new hospital. Unbeknownst to the trial court judge at the time of trial, the judge served on the board of an institution that would financially benefit if one of the defendants to the litigation prevailed.

This Court held that the trial judge had erred in failing to recuse himself under Section 455(a) *after* he had decided the case, when he first learned of the University's interest in the resolution of the trial over which he was presiding, applying the test: "Under section 455(a), therefore, recusal is required . . . if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Liljeberg*, 486 U.S. at 860-61,

quoting Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986).

This Court reasoned that Congress's 1974 amendment of Section 455(a) was "designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test." *Liljeberg*, 486 U.S. at 859 n.7.[4] The primacy of this public policy is so great that the judge in question was obligated to recuse himself even though he was admittedly unaware of the facts giving rise to the appearance of partiality at the time he presided over the trial and issued his decision:

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality.

Liljeberg, 486 U.S. at 860, *quoting Liljeberg*, 796 F.2d at 802.

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[4] Prior to the 1974 amendments, Section 455 mandated recusal where a justice or judge has "a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U.S.C. § 455 (1970 ed.).

Liljeberg makes clear that the controlling issues are not whether Judge Davis harbors any ill will toward Senator Fumo, or whether he has previously expressed any such ill will in public. Were that the case, a judge could avoid his duty to recuse himself by simply holding his tongue in the midst of a controversy directly involving his livelihood and standing in the legal community. Such a result would be inconsistent with the policy of avoiding the appearance of impropriety, as well as the requirement that recusal be judged from the perspective of the "objective, reasonable layperson."

Taking Senator Fumo's factual allegations in his Petition as true, it is clear that the objective, reasonable layperson would conclude under these circumstances that there is a significant appearance of bias or partiality by Judge Davis against Senator Fumo as a result of their repeated past personal and political conflicts.

In opposing Judge Davis' multiple state and federal court nominations, Senator Fumo publicly made repeated personal attacks on Judge Davis' character, honor, independence, integrity, honesty, judicial temperament and suitability for office, stating, *inter alia*, that:

> a. "I also made a number of public statements that were reported in the press, questioning the *character* and *judicial temperament* of Judge Davis. . . ." Affidavit ¶ 8 (emphasis added). App. 27.
>
> b. "Mr. Davis . . . demonstrated . . . [he] did not have the type of *judicial temperament and character* that I think a judge has to have if he is going to be *fair and reasonable and honest and have integrity.*" *Id.* ¶ 10 (emphasis added). App. 28.

> c. Referring to why Senator Fumo did not vote to confirm Judge Davis' nomination in the Senate after he was elected, "I was the only Senator to vote against him. At that time, I made it clear that he would never get my vote because as *The Philadelphia Inquirer* reported, *'I don't think that's the kind of character* I want on the bench.'" *Id.* ¶ 12 (emphasis added). App. 29.

Senator Fumo's actions against Judge Davis during the period of his judicial candidacies spoke even louder than his words. According to his Petition, Senator Fumo was personally and publicly responsible for denying Judge Davis a seat on the state Court of Common Pleas. He led the effort to defeat two successive nominations of Judge Davis by the Governor. After each defeat, Judge Davis faced the prospect that his nomination might be withdrawn. This fight and Judge Davis' attendant doubts about his future continued for nearly a year. As evidenced by his publicly lashing out at Petitioner and other politicians, [redacted]

It is simply inconceivable that one would not harbor some resentment under those circumstances. [redacted]

The pattern of repeated personal attacks and lost opportunities by Judge Davis for advancement was repeated with regard to Judge Davis' nomination to the federal bench. This time, despite a personal plea from President Clinton, Senator Fumo blocked Judge Davis' nomination *for more than three years.* [redacted]

[redacted] The record, however, is to the contrary.

Senator Fumo recounts his personal efforts to block Judge Davis' nominations, asserting that (1) in 1998, "I used my political connections to successfully block Judge Davis' confirmation to the Federal bench;" (2) in 1999, "I again vociferously opposed his nomination" and "I persisted in my vocal and political opposition to Judge Davis' federal judicial nomination despite receiving numerous pleas from his supporters, including a personal entreaty by then President Clinton to support his nomination;" and (3) as of 2002, Senator Fumo was contacted by Judge Davis for a private meeting "after three years of holding up his nomination." Affidavit ¶¶ 13-15. App. 29.

Indeed, at the meeting in 2002, Judge Davis himself "specifically asked me to stop blocking his confirmation to the federal bench." Affidavit ¶ 18. App. 30. As such, there can be little doubt that Judge Davis himself was well aware that Senator Fumo was *the roadblock* to the advancement of his judicial career.

[redacted]

[redacted] The record is to the contrary. In fact, Judge Davis' public statements were quite clearly directed at Senator Fumo and indicate the court's apparent hostility to him personally. The statements by Judge Davis included:

> a. On April 9, 1987, the *Philadelphia Inquirer* reported that Judge Davis believed he was not supported by the local party leaders because of 'back-room politics' and 'Judge Davis made apparent his belief that the party-endorsed candidates were chosen from a corrupt system;' and

Philadelphia Inquirer Article of April 9, 1987, appended to district court Petition for Recusal as Exhibit "G."

> b. During the 1987 primary, Judge Davis "accused party leaders, which included myself, of endorsing other candidates because we were more interested in money and control than we were in selecting candidates based upon merit. Judge Davis went so far as to state that the criminal violations of those judges implicated in the 'roofers scandal' of the 1980's were a direct result of the 'backroom' manner in which judicial candidates were endorsed, thus implying that I and other local party officials were responsible for criminal conduct."

Affidavit ¶ 8. App. 27.

[redacted]

[redacted]

Such a distinction is meaningless, since the evidence clearly demonstrates that Petitioner's public attacks against Judge Davis, and Judge Davis' responses in kind, were *both* political and personal, and of such a serious nature as to reasonably raise a question as to whether the court as a result is biased or partial against the Senator.

In *United States v. Moore*, 405 F.Supp. 771 (S.D. W.Va. 1976), the district court recognized that the appearance of impropriety may arise merely from a long history of political opposition to a judicial appointment. Citing Section 455(a) in determining that it must recuse itself, the district court held that the active and long-standing opposition of the defendants to the court's appointment, if taken as true, might cause a reasonable man to believe that bias and prejudice exists. The district court stated that:

> I have no prejudices against either defendant and there is no doubt in my mind whatever that the defendants would receive a fair trial in my Court. . . . The issue, however, is not whether I have biases and prejudices against these defendants, but whether the affidavits recite sufficient facts to support the allegations of bias and prejudice. That is to say, do the allegations contained in the affidavits provide a fair factual support for the belief that bias or prejudice exists.

United States v. Moore, 405 F.Supp. at 772-73.

The facts here are far more supportive of recusal than those in *Moore*.[5] The published *Legislative Journal*, newspaper articles and Senator Fumo's Affidavit provide more than adequate factual support for the reasonable belief that the long-standing animosity between Senator Fumo and the district court was bitterly personal, mutual and, as Judge Davis frankly admitted in the press at the time, caused him unforseen "personal sacrifice."

Petitioner does not suggest that isolated instances of criticism of a judge will support recusal under Section 455(a). [redacted] Each of those cases reflect but a single incident of criticism of the nominee by a party or its attorney without any demonstrated effect upon the jurist or his nomination. *Compare, e.g., DeNardo v. Municipality of Anchorage*, 974 F.2d 1200, 1201 (9th Cir. 1992) (single letter written by petitioner opposing judge's nomination does not justify recusal); *United States v. Evans*, 262 F.Supp.2d 1292, 1295 (D. Utah 2003) (denying recusal based upon letter by defendant's attorney opposing judge's nomination, because opposition was merely "garden-variety opposition to a judicial nominee" and communication offered no insight into judge's feelings). [redacted]

[redacted]

[redacted] the question of actual animosity is not relevant under Section 455(a). The test is the perception held by an objective layperson unfamiliar with litigation. It is enough that the accepted facts raise a reasonable question as to his partiality and support an appearance of bias and partiality by the court. *See Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980) (under Section 455(a), a judge's introspective estimate of his own ability to hear a case impartially is no longer relevant, and even where the question is close, the judge must recuse himself).

Here, the undisputed record is replete with compelling and dispositive evidence of Judge Davis' negative reaction to the words and actions of Senator Fumo. The record establishes that the Judge participated in the conflict with Petitioner and indeed, expressed hostility toward him. Most importantly, the record clearly establishes that Senator Fumo's efforts in opposing the Judge Davis' various nominations were not "garden-variety," but instead were personal, concerted and successful, blocking Judge Davis' judicial confirmations for a number of years and, at one point, by his own admission, detrimentally affecting his financial condition. These circumstances must raise a question in the mind of the objective observer whether Judge Davis can possibly be impartial and unbiased with respect to Senator Fumo.

[redacted] The passage of time, however, does not as a matter of law cure the appearance of possible bias.

[redacted] First, Senator Fumo's opposition to Judge Davis' federal nomination spanned a nearly five year period, ending a mere four years ago and more importantly, only one year before the alleged onset of the grand jury investigation. Secondly, as noted, Senator Fumo's efforts in opposing Judge Davis were *successful* and did cost Judge Davis years of service as a state and a federal judge. This is not the kind of career consequence whose effect, to the objective layperson, diminishes with time. Indeed, it is not unreasonable that the objective layperson may subscribe to the old adage that "revenge is a dish best served cold."

The passage of time, moreover, does not as a matter of law cure the appearance of bias. *See Clemmons v. Wolfe*, 377 F.3d 322 (3d Cir. 2004) (although more than *20 years* had passed, failure to recuse created an appearance of impropriety that ran the risk of undermining the public's confidence in the judicial process).

[redacted]

[redacted]

The only reasonable inference from the evidence is that Judge Davis sought his meeting with Senator Fumo in 2002 because he knew that the Senator was successfully blocking his nomination. That Judge Davis, as a sitting common pleas judge and federal nominee, was forced to go personally with his proverbial "hat in hand" to a one-on-one meeting with Senator Fumo to ask him to end his opposition to the nomination must raise a question in the mind of a layperson as to the judge's appearance of bias. It is difficult to imagine that a *judge or anyone* under such circumstances would *not* harbor a significant degree of resentment.

The purpose of Section 455(a) is to protect the public's confidence in the judiciary by avoiding even the appearance of partiality. To allow Judge Davis to continue to supervise the grand jury [redacted] where the Senator has repeatedly and publicly questioned the court's character, honesty and integrity, and where the court has responded with his own publicly expressed disdain for the Senator – alone raises the appearance of impropriety. When one then considers that, as a result of the Senator's actions, the district court has suffered years of uncertainty and lost service as a jurist, in the mind of the objective lay observer, that appearance compels recusal. The Third Circuit's summary denial of Senator Fumo's Writ of Mandamus evidences an inability to forswear an attorney's and/or jurist's perspective, and view the ample and crystal clear evidence of the appearance of impropriety as

to Judge Davis from the vantage point of the objective layperson. Particularly in this context, where Judge Davis exercises his judicial duties as supervising judge principally in secret, away from the glare of public scrutiny, the public's interest in a judiciary untainted by the appearance of impropriety is paramount.

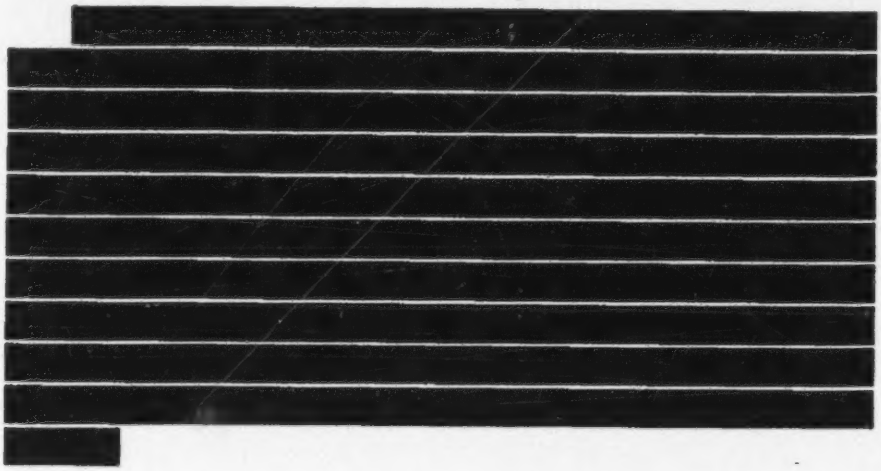
B. Senator Fumo's Petition For Recusal Was Timely Filed

[redacted] and (3) [redacted]

The timeliness of a petition for recusal is not to be measured in some absolute and arbitrary manner from the date of discovery. *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978). Instead, the determination of timeliness requires a balancing between the competing institutional interests in avoiding the appearance of impropriety, on the

[6] The district court, without a hearing, improperly accepted the government's unsworn statement [redacted] 51.

one hand, and in avoiding abuse of the recusal procedure by waiting for an unfavorable outcome, on the other. *Smith v. Danyo*, 585 F.2d at 86. *See also*, *In re Kansas Public Employees Retirement System*, 85 F.3d 1353, 1363 (8th Cir. 1996) (The policy considerations supporting a timeliness requirement are the same in each (recusal) section: to conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge.). As such, the touchstone as to timeliness is whether there exists evidence of abuse of the recusal mechanism for some tactical advantage.



The decision to seek recusal is difficult. It requires careful thought and investigation. It should not be done lightly. The burden is initially placed on the judge to disclose possible grounds for disqualification, which further counsels against precipitously asserting the appearance of bias. *See In re Kensington Int'l, Ltd.*, 368 F.3d 289, 313 (3d Cir. 2004). The district court's opinion, however, would penalize petitioner for exercising reasonable caution in such a serious and sensitive matter. This cannot, and should not, be the law.

In re United States, 441 F.3d 44 (1st Cir. 2006), is also instructive in its balanced approach to the issue of timeliness. There, the government sought recusal arising from the supervising judge's ongoing inquiry of the government's alleged violations of Rule 6(e), despite the government's knowledge that the investigation had gone on for over a year. The First Circuit Court of Appeals ruled that the government's motion for recusal was timely and that the government's delay was not unreasonable under the circumstances.

Given the importance of the policy considerations underlying the recusal statutes, all circuit courts have rejected a mechanical analysis of timeliness and instead have balanced those important considerations against any evidence that the moving party has sought recusal for improper purposes. On this record there is simply no evidence that Senator Fumo improperly delayed filing his recusal request. As such, the district court's mechanical timeliness analysis must be rejected.

First, [redacted]

Second, [redacted] afoul of Article III, § 2 of the United States Constitution which limits the exercise of federal judicial power to actual

cases or controversies. In *United States v. Sciarra*, 851 F.2d 621 (3d Cir. 1988), the government filed a motion to compel the depositions of former union officials of Teamsters Local 560 incident to the district court's oversight of the union. The union officials in turn sought to recuse the district court before whom the motion to compel was pending. The Third Circuit concluded that as non-party witnesses, the union officials had no standing to invoke the recusal statute.

Specifically, the Third Circuit held that the union officials had not presented an actual case or controversy sufficient to confer standing. [redacted] request.

Similarly, [redacted] It was only upon his formal appearance before the supervising judge incident to his 6(e) petition that Senator Fumo became a party to a case or controversy and was possessed of sufficient personal interest in the proceedings to constitutionally challenge Judge Davis' apparent partiality.

Traditional prudential standing considerations also require reversal of Judge Davis' timeliness ruling. In *In re Grand Jury*, 111 F.3d 1066 (3d Cir. 1997), the Third Circuit reviewed the standing considerations to be employed in the context of grand jury proceedings. In

addition to holding that the litigant must assert his or her own legal interest rather than those of third parties, the Court counseled against conferring standing if to do so would unduly impede the grand jury investigatory process. *In re Grand Jury*, 111 F.3d at 1072-73. This potential for abuse, however, is exactly what the district court invites as it conveys unwarranted standing, at even the earliest stage, to any potential target within the broad scope of a grand jury's investigation.

The potential for undue delay of the grand jury process is particularly evident when viewed in light of [redacted]

[redacted]

Indeed, it is difficult to imagine a more improvident grant of standing. The district court's holding is in derogation of controlling law of this Circuit governing the timeliness of Section 455(a) petitions and well-settled constitutional and

[redacted]

prudential standing requirements. The Third Circuit's failure to rectify the situation compels this Court's swift action.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

October 23, 2006

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 24, 2006
A-144-E

No. 06-3497

In Re: Grand Jury
(Eastern District of Pennsylvania(D.C.#03-gj-00123)

Present: SLOVITER, MCKEE and FISHER, Circuit Judges

1. Petition for Writ of Mandamus and Request for Expedited Hearing Filed Under Seal.

/s/ Carmella L. Wells
Carmella L. Wells 267-299-4928
Case Manager

ORDER

The foregoing Petition for Mandamus directing recusal of Judge Legrome D. Davis as supervising judge of the Grand Jury and the request for an expedited hearing is denied on the merits.

By the Court,

/s/ D. Michael Fisher
Circuit Judge

Dated: July 27, 2006
CLW/cc: Richard A. Sprague, Esq.
Geoffrey R. Johnson, Esq.
Mark B. Sheppard, Esq.
Richard L. DeSipio, Esq.
Robert A. Zauzmer, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	**No. 03-123**
	:	
GRAND JURY INVESTIGATION	:	

ORDER

and

MEMORANDUM OPINION

[Redacted In Entirety]

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

AFFIDAVIT OF SENATOR VINCENT J. FUMO

I, Vincent J. Fumo, being duly sworn according to law, do hereby swear and depose the following:

1. I have been involved in Democratic Party politics on a national, state, and local level most of my adult life. During my political carrier [sic] I have served as a Democratic committeeman, Democratic Ward leader, and as executive assistant to the Chairman of the Philadelphia County Democratic Executive Committee. In 1978, I was elected to Pennsylvania Senate from the First Senatorial District and continue to serve in that capacity. As a member of the Senate and as a local democratic party leader, I have been intimately involved in countless decisions involving the nomination, selection or election of judges at the federal, state and local level.

2. It was in this capacity that I first encountered the Honorable Legrome D. Davis. Beginning in or around late 1986, as a result of numerous vacancies on the Court of Common Pleas of Philadelphia County I along with leaders from both the Democrat and Republican political parties worked together to select and endorse those lawyers who we believed were the best candidates to fill those vacancies on the Court. Judge Davis, then a local Assistant District Attorney, was one of a number of candidates who sought our support. He did not receive it.

3. In or about February 1987, then Governor Robert P. Casey submitted a list of nominees for confirmation to the Senate of Pennsylvania to fill ten (10) vacancies on the

Philadelphia Court of Common Pleas. The nominations were for immediate interim appointments that were to expire the following January, when the vacancies would be filled by duly elected judges. The Governor's nominees included certain persons who were not among those supported by the Philadelphia Democratic party, including specifically Judge Davis. If confirmed by the Senate, these nominees would have a great advantage over the endorsed candidates in the upcoming primary.

4. Given my role as a party leader, it was my duty to actively opposed [sic] the confirmation of Judge Davis and the other non-endorsed candidates and I did so. This was reported in the March 8, 1987 *Philadelphia Inquirer* article entitled "Judicial Struggle Develops: Nominees Facing Party Opposition. I enlisted other senators and political leaders from both parties in this effort.

5. On April 6, 1987, the Senate considered the Governor's slate of judicial nominees for the first time. (Under Senate procedures, a nomination may be brought to the floor three times, if necessary.) The Senate voted to confirm five of the nominees, all of whom had received the endorsements of their respective local political parties. The Senate refused to confirm however, by fairly comfortable margins, the nominations of Judge Davis and the other two judicial nominees who did not have the party endorsement. Though I was not personally present for the vote, my colleagues were well aware of my strong opposition to Judge Davis' nomination.

6. The next day, April 7, 1987, Judge Davis' nomination was brought to the floor of the Senate for a second time. Judge Davis' nomination was again easily defeated. Knowing, from the previous day's roll call that Judge

Davis did not have the two-thirds majority necessary for confirmation, I voted for Judge Davis' confirmation as a matter of political expediency.

7. On April 8, 1987 and as reported in a *Philadelphia Daily News* article dated that same day, Governor Casey, despite being "unable to win support for his nominees who did not have the blessings of city political leaders," announced that he was re-submitting the five nominees [including Judge Davis], referred to as the "Casey Five." The Senate deferred action on the nominations until after the judicial primary election set for May 19, 1987.

8. The judicial primary election was unusually bitter and garnered an unusual amount of press coverage. In a number of reported statements by Judge Davis, he accused party leaders, which included myself, of endorsing other candidates because we were more interested in money and control than we were in selecting candidates based on merit. Judge Davis went so far as to state that the criminal violations of those judges implicated in the "roofers scandal" of the 1980's were a direct result of the "back room" manner in which judicial candidates were endorsed, thus implying that I and other local party officials were responsible for criminal conduct. I also made a number of public statements that were reported in the press, questioning the character and judicial temperament of Judge Davis and other unendorsed judicial candidates. In particular, I questioned the manner in which they conducted their campaigns and the fact that they would be beholden to the "elitist" large law firms, from whom Judge Davis and the other "Casey" nominees actively solicited contributions. At a widely reported press conference, I characterized the practice as "despicable."

9. Despite my vocal opposition, Judge Davis narrowly won the primary, securing a ballot position as one of the judicial candidates on the Democratic ticket for the general election. As a result, Judge Davis was virtually assured of being elected the following November and would join the Common Pleas Bench in January of 1988.

10. Following his primary victory, Judge Davis' supporters continued to pursue his nomination by the Governor so that he could immediately assume the bench. I, in turn, continued to spearhead the opposition to Judge Davis and the other "Casey" candidates in the Senate. On June 24, 1987, during the floor debate on the "Casey" nominations, I rose to the floor and made the following statement in opposition to Judge Davis and one other nominee:

> Mr. President, during the rigors of a campaign is when many people's character comes through . . . Mr. Davis . . . demonstrated [he] did not have the type of judicial temperament and character that I think a judge has to have if he is going to be fair and reasonable and honest and have integrity. Yes, we need judges in Philadelphia, but we need excellent judges. We need the very best judges we can find in the city. These two gentlemen do not fit into that character, in my opinion.

The Senate again rejected the nominations of Judges Davis and other unendorsed nominees. On June 25, 1987, the *Philadelphia Daily News* attributed the Senate's failure to confirm the nominees directly to my opposition.

11. Judge Davis was elected to the Philadelphia Court of Common Pleas in November of 1987. Shortly thereafter, Judge Davis' supporters brought his nomination to the floor

one last time. His position on the bench now assured, he was confirmed.

12. I was the only Senator to vote against him. At that time, I made it clear that he would never get my vote because as *The Philadelphia Inquirer* reported, "I don't think that's the kind of character I want on the bench."

13. In 1998, President Clinton nominated Judge Davis to the United States District Court for the Eastern District of Pennsylvania. I used my political connections to successfully block Judge Davis' confirmation to the Federal bench. His nomination expired without even being considered by the U.S. Senate.

14. He was re-nominated in 1999. I again vociferously opposed his nomination. I persisted in my vocal and political opposition to Judge Davis' federal judicial nomination despite receiving numerous pleas from his supporters, including a personal entreaty by then President Clinton to support his nomination. I respectfully refused. Judge Davis second nomination also expired without United States Senate consideration.

15. In 2002, after three years of holding up his nomination, Judge Davis asked [redacted] to set up an appointment to meet with me privately at my district office in Philadelphia. [redacted] quested that I meet with Judge Davis and I agreed.

16. It is my current understanding that [redacted]

17. Judge Davis came alone to my District Office and the two of us met alone in my office. While there, he told

me he knew I had spoken with U.S. Senators and White House staff in opposition of his nomination. He also acknowledged that he knew that top aides from the White House had expressly asked me to abandon my opposition to his confirmation.

18. He then specifically asked me to stop blocking his confirmation to the federal bench. At the time, Judge Davis was aware that this was his third, and likely final opportunity to secure Senate confirmation. I told him that my opposition was not personal, but that I had previously agreed to support another potential nominee. I did agree however, to cease my personal efforts to block his nomination.

19. I regret the record demonstrates a long history of political animosity between myself and Judge Davis. I hold no will toward Judge Davis. Our history, however, is one of an often volatile political relationship characterized by public statements of political animus which has existed for almost twenty years.

/s/ Vincent J. Fumo
Vincent J. Fumo

Sworn before me, a Notary Public,
this 16th day of June, 2006.
/s/ [redacted]
Notary Public

NOTORIAL SEAL
[redacted]
Notary Public
CITY OF PHILADELPHIA,
PHILADELPHIA COUNTY
My Commission Expires Dec. 30, 2006